IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI

CRIMINAL APPEAL NOS.69 AND 77 OF 2000

CRIMINAL APPEAL NO.69 OF 2000

1. Roy Fernandes,
   s/o Tony Fernandes,
   r/o Pilimbivaddo,
   Siolim, Bardez, Goa.

2. Domnic Mendes,
   s/o Felix Mendes,
   r/o St. Anthonywaddo,
   Anjuna, Goa.

3. Sandeep Morajkar,
   s/o Damu Morajkar,
   r/o Alto Porvorim,
   Bardez, Goa.

4. Mervin Menezes,
   s/o Camilo Menezes,
   r/o Grand Morod,
   Saligao, Bardez, Goa. ... Appellants.

versus

S T A T E ... Respondent.

Mr. Lalit Chari, Senior Advocate with Mr. Jaideep Lele and Mr. S. M. Singbal, Advocates for the Appellant No.1.

Mr.Menino Teles, Advocate for the Appellant No.2.

Mr. G. M. Kanekar, Advocate for the Appellant No.3.

Mr. Albano Viegas, Advocate for the Appellant No.4.

Mr. A. P. Lawande, Public Prosecutor for the Respondent.

CRIMINAL APPEAL NO.77 OF 2000

Anthony D'Souza,
presently in custody at
Central Jail, Aguada, Goa. ... Appellant.

versus

S T A T E ... Respondent.

Mr. Menino Teles, Advocate for the Appellant.

Mr. A. P. Lawande, Public Prosecutor for the Respondent.

CORAM: V. C. DAGA &
P. V. HARDAS, JJ.

DATE OF RESERVING
THE JUDGMENT ; 24TH JUNE,2002.

DATE OF PRONOUNCING
THE JUDGMENT : 22ND JULY,2002.

JUDGMENT(PER P.V.HARDAS, J.)

The Appellants in both the Appeals, who were Original Accused Nos.1 to 5 in Sessions Case No. 21 of 1997 assailed the conviction and sentence passed by the Additional Sessions Judge, Mapusa, by his Judgment dated 6th October, 2000. The conviction and sentence passed against the Appellants/Accused is as follows:-

	Conviction	Sentence
a).	Under Section 143 r/w Section 149 of I.P.C..	2 months R.I. each.
b).	Under Section 148 r/w Section 149 of I.P.C..	R.I. for 3 months.
c).	Under Section 323 r/w Section 149 of I.P.C..	R.I. for 1 month.
d).	Under Section 325 r/w Section 149 of I.P.C..	R.I. for 1 year each and to pay fine of Rs.1000/- each, in default S.I. for 1 month.

e).	Under Section 302 r/w Section 149 of I.P.C..	Imprisonment for life each and to pay fine of Rs.2000/- each, in default S.I. for 3 months.

2. The brief facts necessary for the decision of the Appeal are set out hereunder:-

On 11th May, 1997, at about 8.05 a.m., A.S.I. Shri Nazir, attached to the Mapusa Police Station, was informed by a letter by the doctor of the Asilo hospital that one person by name Felix Felicio Monteiro was admitted in the hospital due to injury. A.S.I. Shri Nazir, on the basis of the said information made an entry in the Station register at serial no.7. P.W.22, Subhash Goltekar, who was attached to the Mapusa Police Station as P.I., on receipt of the above referred information, proceeded to the Asilo hospital along with the staff. At the hospital, a guard was posted to keep a charge over the body of the said Felix Felicio Monteiro and P.W.22, P.I. Subhash Goltekar, then proceeded to the house of the deceased and recorded the complaint of Sebastian alias Tina Monteiro. The said complaint is at Exh.PW1/A. From the house of the deceased, P.W.22, P.I. Subhash Goltekar, then proceeded to the Asilo hospital where he drew an Inquest Panchanama at Exh.PW2/A in the presence of P.W.2, Alima Monteiro and one Pilagio Marcelino. By

memo at Exh.PW22/A, P.W.22, P.I. Subhash Goltekar, referred the dead body for post mortem. Thereafter, P.W.22, P.I. Subhash Goltekar, recorded the scene of offence panchanama vide Exh.PW22/A in the presence of Jose Monteiro and Rumalo D'Souza. At the scene of the offence, pickaxe, spade, crow bar, ghamelas, plastic pot, barbed wire, pair of rubber chappals, pair of leather chappals, one tire and cutter were attached. The sample of the blood on the ground was also taken. Thereafter, P.W.22, P.I. Subhash Goltekar, arrested Accused No.1, Roy Fernandes and Accused No.2, Anthony D'Souza vide Arrest Panchanama Exhs.P.W.16/A and P.W.16/B in the presence of P.W.16, Umesh Lotlikar, Anant Adelkar and Suresh Lotlikar. By memo at Exh.P.W.22/C, Accused Nos.1 and 2 were sent to the Goa Medical College for examination. The Accused No.2 had a contused lacerated wound 2 mm x 1 mm at the forehead caused by blunt object less than 24 hours duration. The injury was simple in nature. The injury certificate of Accused No.2 is at Exh.PW19/A colly. By memo at Exh.PW22/E the injured person namely Paul Menezes, Philomena D'Souza, P.W.7, Conceicao Monteiro, Apolin D'Sa and P.W.5, Martha Dias were referred for medical examination at the Asilo hospital. By another memo at Exh.PW22/F, P.W.6, Remedios Salis Monteiro, was also referred to the Asilo hospital for examination. Their medical certificates are collectively marked as

Exh.PW19/A colly. P.W.22, P.I. Subhash Goltekar, then recorded the statements of the injured witnesses and handed over the investigation to P.W.21, P.I. Chandrakant Salgaonkar. Before handing over the investigation, P.W.22, P.I. Subhash Goltekar, arrested the remaining Accused i.e. Accused Nos.3 to 5 on 12th May, 1997 vide Arrest Panchanama at Exh.PW16/B. Their clothes also came to be attached.

3. On 13th May, 1997, P.W.21, P.I. Chandrakant Salgaonkar, took over the investigation from P.W.22, P.I. Subhash Goltekar. On the same day, he sent a letter to the Executive Magistrate to conduct identification parade. The blood group of the Accused was ascertained. On 19th May, 1997, the house of Accused No.1 was searched vide house search panchanama at Exh.PW3/A. During the course of the house search, a knife cover, live cartridges and a belt were recovered. At the instance of Accused Nos.3 and 4, knife(M.O.30) came to be discovered under discovery panchanama Exh.PW13/A. Vide panchanama at Exh.PW11/A at the instance of Accused No.5, two bicycle chains(M.O.22) came to be attached.

4. After completion of the investigation, a charge-sheet against the Accused for an offence punishable under Sections 143, 147, 148, 302, 201 and

323 r/w Section 149 of the Indian Penal Code came to be filed. After committal of the case to the Session, charge at Exh.8 came to be framed against the Accused for an offence punishable under Sections 143, 148, and 302 r/w Section 149 of the Indian Penal Code, Sections 323 and 326 r/w Section 149 of the Indian Penal Code and Section 201 r/w Section 149 of the Indian Penal Code. The Accused claimed to be tried by denying their guilt. The prosecution examined 22 witnesses in support of its charge. Accused No.1, in response of question no.104 in the Statement under Section 313 of Criminal Procedure Code has taken the following defence.

> "On that day I had gone along with Anthony D'Souza to the house of my mother-in-law. It was the birthday of my sister-in-law. My mother-in-law and sister-in-law had gone to church. I saw a big crowd near the big gate. I reversed my car and came to the small gate. I ran towards the house. The crowd came into the courtyard. I went to the house and closed the door. When I came to the courtyard I heard Anthony shouting. Anthony was bleeding from the forehead. I took him to the P.S. and tried to lodge complaint. They did not take my complaint. I was arrested at 12.30 noon. The crowd was digging pits just 1/2 metre from the gate where the road is hardly 5 metres. I am producing copy of complaint to I.G.P., Certificate of priest and Judgment of H.C.".

5. The other Accused Nos.2 to 5 state that they have been falsely implicated. The learned Trial Court on consideration of the entire evidence convicted and sentenced the Accused as aforesated.

6. The pivot of the prosecution case is the evidence of the injured eye witnesses who are(1) P.W.1, Sebastiana Monteiro, P.W.4, Julie Monteiro, (3) P.W.5, Martha Dias, (4) P.W.6, Salish Monteiro and (5) P.W.7, Conceicao Monteiro. The prosecution has also eexamined one independent eye witness who is P.W.10, Shashikant Kundaikar. The panch witnesses are P.W.2, Alima Monteiro, P.W.11, Suresh Matonkar,, P.W.12, Indrakant R.Salgaonkar, P.W.13, Ramprasad R. Joshi and P.W.16, Umesh Lotlikar. The medical evidence comprises of P.W.3, Dr. E. J. Rodrigues, who performed the post mortem vide his report at Exh.PW3/A. P.W.8, Dr. Shanta Sardessai, who examined P.W.7, Conceicao Monteiro and noticed a fracture vide report at Exh.PW8/A, P.W.19, Dr. Vasco Teles and P.W.20, Dr. Ramakant Bhinge. The Junior Scientific Officers examined by the prosecution are P.W.17, N.R.K. Rao, whose report is at Exh.PW17/A and P.W.18, N.R.Shankpal. P.W.9, R. V. Parab, is a Clerk in the Office of the Mamlatdar who has proved the memorandum of the identification parade at Exh.PW9/A. The Mamlatdar who had conducted the identification parade, expired during

the pendency of the trial. The prosecution has also examined P.W.14, Manohar D. Joshi, who is working as Scientific Assistant in the Crime Branch and who had forwarded the samples for examination.

7. P.W.1, Sebastiana Monteiro, widow of deceased Felix Monteiro states that the deceased had retired from the service but was working as the President of the Chapel at Bastora. She states that she knew one Rosalina Monteiro who resides at Bastora just behind the Chapel. The property of the Chapel joins the property of Rosalina. According to her, on 11th May, 1997, at about 7.00 a.m., P.W.1, Sebastiana Monteiro, her husband deceased Felix Monteiro, P.W.4, Julie Monteiro, P.W.5, Martha Dias, P.W.6, Salish Monteiro, P.W.7, Conceicao Monteiro, one Poly Romeo and others had gone to the property of the Chapel in order to put a fencing around it. To facilitate the putting of the fencing, the prosecution witnesses had taken with them spade, crow bar, cement, domillas and other articles. The fencing put up was that of cement poles and for the purposes of embedding the poles pits were being dug. They started digging the pits in the portion which was facing the house of Rosalina. According to P.W.1, Sebastiana Monteiro, within 5 minutes thereof, one Antonetta, daughter of said Rosalina started abusing them from her gate. After about 10 to 15 minutes, a

maruti van of white colour came there and was parked in front of the gate of Rosalina's house. From the said car, 5 persons alighted who are identified by P.W.1, Sebastiana Monteiro as Accused Nos.1 to 5. According to her, Accused No.1 went to P.W.6, Salish Monteiro, who was standing near her husband and gave a fist blow on the mouth of P.W.6, Salish Monteiro, due to which P.W.6, Salish Monteiro lost some teeth and began bleeding from his mouth. According to P.W.1, Sebastiana Monteiro, the Accused No.1 then gave a slap on the face of deceased Felix Monteiro and threw him down. The remaining four Accused i.e. Accused Nos.2 to 5 came running towards them. Accused No.5 was armed with a chain. Accused No.2 was carrying a knife and Accused No.3 was having a broad belt. According to P.W.1, Sebastiana Monteiro, as her husband had fallen down, he was taken and brought to the road. To that, all the Accused went rushing towards them and Accused No.1 gave a slap on the face of P.W.1, Sebastiana Monteiro. According to her, her husband was thereafter standing on the road and at that time, Accused No.2 dealt a knife blow on the left thigh of her husband. Accused No.2, removed the knife and went to the road and she states that she saw Accused No.2 putting that knife in its cover and thereafter, he went to P.W.6, Salish Monteiro. The other people rushed to the rescue of P.W.6, Salish Monteiro, while she remained alone

with her husband. According to her, her husband deceased Felix Monteiro succumbed at the very spot where he was lying. P.W.1, Sebastiana Monteiro, shouted for help and she requested one John, her neighbour to take the deceased to the Asilo hospital and accordingly, the deceased was taken to the Asilo hospital accompanied by P.W.1, Sebastiana Monteiro. According to her, in the hospital, the deceased was declared dead and thereafter, she went home. The Police went at her residence and her complaint at Exh.PW1/A came to be recorded.

8. In the cross-examination, P.W.1, Sebastiana Monteiro, has admitted that there is a litigation pending between her and Rosalina and on account of the litigation, they are on enemical terms. She denied the suggestion that due to the litigation, they were not on talking terms. She volunteered and stated that the litigation was not personally between her and Rosalina. She had stated that she had given the names of all the 5 Accused in her complaint but later on, corrected herself by saying that she had stated the name of Accused No.1 only and not the names of the other Accused as she was not knowing their names. She had also admitted that she had not give the description of the other Accused nor details regarding their age, complexion etc.. She admitted that she had not

described the clothes which the Accused were wearing. She further stated in the cross-examination that she does not know whether permission was taken by her husband for laying the foundation in the property of the Chapel. She denied the suggestion that in order to disturb the function of inauguration, her deceased husband had purposely brought goondas and some neighbours and dug the foundation in front of the gate to block the acccess of the house of Rosalina. In the cross-examination, she admitted that the daughter of Rosalina had not given bad words. She admitted that she knew that Accused No.1 was the son-in-law of Rosalina. She stated that she had stated in her complaint that Accused No.1 gave a fist blow on the mouth of P.W.6, Salish Monteiro, whereas when confronted with the complaint it was noticed that she had stated "they first attacked one Salish assaulting him on his face with fist blows". Omission was brought out regarding parking of the car in front of the gate. Similarly, omissions regarding P.W.1, Sebastiana Monteiro, and P.W.4, Julie Monteiro, standing near the deceased were brought on record. Similarly, omissions regarding the loss of teeth by P.W.6, Salish Monteiro, after the blow were brought on record. Similarly, omissions regarding the Accused No.1 giving slap on the face of the deceased and throwing him down was also brought on record. Omission regarding Accused No.1

slapping P.W.1, Sebastiana Monteiro, was also brought on record. Attempt was made by the defence to bring on record omission regarding stabbing of the deceased by Accused No.2. However, the learned Trial Court has recorded in respect of the omission that the witness does not know why it is not recorded by the Police in the fashion in which P.W.1, Sebastiana Monteiro deposed. Omission was also brought on record of Accused No.2 putting the knife in its cover after stabbing the deceased. Some minor omissions regarding the other person rushing to the rescue of P.W.6, Salish Monteiro, and P.W.1, Sebastiana Monteiro, remaining alone with her husband were brought on record. She denied the suggestion that P.W.6, Salish Monteiro, had hit a stone on the head of Accused No.2. Similarly, she also denied the suggestion that the deceased was injured because of a pickaxe.

9. It would be seen from the complaint at Exh.PW1/A that P.W.1, Sebastiana Monteiro, has stated in her complaint that Accused No.1 and another person were present and they first attacked one Salish and assaulted him on his face with fist blows and when the wife intervened she was also assaulted. According to the complaint, the said two persons then moved towards her husband and one of them slapped her husband due to which, he fell on the ground. The omissions which have

been brought out in respect of Accused No.1 giving fist blows to Salish and slapping the wife of Salish, according to us, are not material omissions. There is a reference to Accused No.1 and another Accused giving fist blows to Salish and slapping the wife of Salish. It has also to be remembered that the omissions have been brought out qua the report. It is well settled that a report is not meant to be a detailed chronology of the events. Minor omissions in respect of the First Information Report would not adversely affect the credibility of the witness.

10. P.W.4, Julie Monteiro, wife of P.W.6, Salish Monteiro, after referring to the presence of the other witnesses at the scene of the offence states that when they were working, one Rosalina was talking. She further states that after about 10 to 15 minutes, a white car came. The persons who alighted the car were armed with knives. They came towards her husband Salish and questioned her husband as to whether he had become a "dada". According to P.W.4, Julie Monteiro, Accused No.1 then gave a slap on the face of Salish and also a fist blow due to which Salish lost two teeth. P.W.4, Julie Monteiro, states that she questioned Accused No.1 as to why he had assaulted her husband. Thereupon, Accused No.1 gave a fist blow on her left shoulder. According to her, Accused No.1 then

assaulted the other ladies who had rushed to the rescue of Salish by giving fist blows and slaps. According to her, Rosalina also came to the scene of the offence and attempted to throw and hit Julie with a stone. However, due to the intervention of one lady, Rosalina could not hit Julie with a stone. She states that she saw the deceased fallen on the ground and was bleeding from his left thigh.

11. P.W.4, Julie Monteiro, in her cross-examination has admitted that they wanted to construct the compound wall to the Chapel thereby blocking the gate of Rosalina. She denied the suggestion that Rosalina patiently told them not to make the construction. P.W.4, Julie Monteiro, has admitted that they had dumped 4 cement poles in front of the gate. Omission was brought out in respect of fist blow on the face of Salish which resulted in the loss of teeth. She denied the suggestion that her husband Salish had thrown a stone at Accused No.2 as a result of which Accused No.2 received a bleeding injury.

12. In respect of this witness, some minor omissions have been brought on record which really do not discredit the veracity of this witness.

13. P.W.5, Martha Dias, states that she along with the others had gone to work on being requested by the deceased. She states that at that time Rosalina started giving abuses to them. In the meantime, a white car came on the spot and Accused No.1 followed by the other Accused got down from the car. She states that Accused No.1 attacked P.W.6, Salish Monteiro. She states that the Accused were having danda, belts and iron chains. She states that Accused No.1 gave a fist blow to P.W.6, Salish Monteiro, due to which P.W.6, Salish Monteiro, lost his teeth. She states that Accused No.1 had pushed her and she was thrown on the stone as a result of which, she received an injury to her right leg near the knee. She further states that Accused No.2 came with a knife and stabbed the deceased at the thigh. According to her, the deceased was then taken to the hospital.

14. In the cross-examination, she has admitted that she was not knowing Accused Nos.2 to 5 before the date of the incident but had seen them on the day of the incident. She has admitted that she has not given the description of Accused Nos.2 to 5. She was then questioned regarding the test identification parade which she had attended and she admitted that she had not identified Accused No.4. She has admitted in the cross-examination that at the time of the incident, the

work had not started at all. In the cross-examination, she has also admitted that there was no talk between Accused No.1, Roy Fernandes, and P.W.6, Salish Monteiro. Omission was brought out vis a vis her statement that Accused No.1 had given a fist blow on the mouth of P.W.6, Salish Monteiro, as a result of which, his tooth was dislocated. Omission was also brought out in respect of Accused No.1 pushing her as a result of which she fell on the stones. In respect of the stabbing of the deceased, an omission is brought out in respect of the name of the Accused No.2. This omission is an extremely insignificant omission as the witness has admitted that on the day of the incident, she did not know the name of Accused No.2. She denied the suggestion that she had falsely stated that Accused No.2 stabbed the deceased. Similarly, she denied to have stated in her statement that the entire incident lasted for two minutes. She was confronted with the said portion from her statement. Some omissions were brought out in the testimony of this witness regarding the length of the knife, the clothes which the deceased was wearing and the distance at which she was standing from the deceased when the deceased was stabbed. She also denied the suggestion that on 11th May, 1997, they did not allow Accused No.1, Roy Fernandes, to take his car from the gate and at that time, they were working on the spot. She also denied the suggestion that they

all threatened the Accused No.1, Roy Fernandes,and went inside the house. She also denied the suggestion that the deceased while running fell on the pickaxe and sustained the injuries. Similarly, she also denied the suggestion that because of a fall, she had sustained the injuries.

15. Salish Monteiro is examined as P.W.6. According to him, a truck load of laterite stones was brought on 10th May, 1997, a day before the incident and the Accused No.1, Roy Fernandes, by keeping his Maruti Car behind the truck had not allowed the unloading of the stones. He further states that Accused No.1, Roy Fernandes, had also given threats and abuses. Because of the attitude of Accused No.1, Roy Fernandes, the truck could not be unloaded. He further states that on 11th May, 1997, they all went to the site along with other villagers. At about 7.30 a.m., Rosalina Monteiro started giving abuses. Accused No.1, Roy Fernandes, came in his car and parked the same in the property of the Chapel at about 8.00 a.m. and gave a fist blow on him. Accused No.1, Roy Fernandes, hit two or three fist blows on his mouth due to which he lost two teeth. He further states that in the meantime, four to five persons came from the car and attacked him with a chain. They were also armed with iron bar. He says they assaulted him on the left

shoulder, neck and back. He states that his wife Julie, Conceicao and Tina rushed to his rescue. The Accused No.1, Roy Fernandes, gave a fist blow on Julie and slaps on Conceicao and Tina. He states that when he saw the deceased, he was already stabbed and fallen on the ground. A car was arranged to take the deceased but the Accused No.1, Roy Fernandes, did not allow the deceased to be taken. In the cross-examination, this witness has stated that on the day of the incident, he was not knowing Accused No.2, Anthony D'Souza but had seen him on that day. He also admitted that he had not given the name of Accused No.2, Anthony D'Souza, in his statement recorded by the Police. He also says that he had not given the description of Accused No.2, Anthony D'Souza to the Police. He denied the suggestion that he had not seen the Accused No.2, Anthony D'Souza on the day of the incident. Omission was proved in the statement of putting up a new gate, a month prior to the date of the incident. Similarly, an omission was brought out in respect of the parking of the car of Accused No.1, Roy Fernandes behind the truck, a day prior to the date of the incident. Omission was also brought out in respect of the inability of the truck driver to unload the truck on the previous day. Omission was also brought out in his cross-examination in respect of the fact that he was assisting the others in mixing the cement and was bringing water. Omission

was also brought on record in respect of Rosalina Monteiro giving abuses. Omission was also brought out in respect of Accused No.1, Roy Fernandes parking his car in the property of the Chapel. In the cross-examination, he admits that he had no artificial teeth. Omission was brought out in respect of the other four to five persons being armed with iron bars also. Omission was brought out in respect of assault on this witness on his left shoulder and left hand. Omission was also brought out in respect of his wife Julie, Conceicao and Tina rushing to his rescue. Omission in respect of assault on Julie and giving slaps to Conceicao and Tina was also brought on record. Omission in respect of the hindrance caused by Accused No.1, Roy Fernandes to take the deceased to the hospital was also brought on record. He denied the suggestion that he had hit a stone on Accused No.2, Anthony D'Souza, causing bleeding injury to Accused No.2, Anthony D'Souza.

16. Conceicao Monteiro is examined as P.W.7. She states that she knew Accused No.1, Roy Fernandes. She states that the deceased had asked her to go for work to assist others in fencing the Chapel property. She states that while they were working, a car came to the spot and Accused No.1, Roy Fernandes, along with the other Accused got down from the car. She states that

Accused No.1, Roy Fernandes, gave a fist blow on P.W.6, Salish Monteiro, as a result his teeth were uprooted. She further states that when she went to the rescue of P.W.6, Salish Monteiro, Accused No.1, Roy Fernandes, slapped her on her head. She also says that someone hit a danda blow on her right hand. She further states that when Accused No.1, Roy Fernandes went to assault the deceased, the deceased was on the road. She says that she saw someone removing a knife from the cover and stabbing it on the deceased on the left side. She further states that when the Accused got down from the car, the Accused were armed with a knife, belt and chain. She says that she does not know who stabbed P.W.6, Salish Monteiro.

17. In the cross-examination, she admits that she had not given the description of the other Accused. She also admits that she had not described the type of clothes they were wearing. She states that the car came to the spot at about 7.30 to 7.45 a.m. She denied the suggestion that they blocked the car of Accused No.1, Roy Fernandes and gave threats to Accused No.1. Roy Fernandes. Omission was brought out in respect of the fact that the injury of P.W.6, Salish Monteiro, was bleeding. Omission was sought to be brought on record of the witness rushing to the rescue of P.W.6, Salish Monteiro. The learned Trial Judge has recorded that in

the statement, it was stated that the ladies tried to separate Accused No.1, Roy Fernandes and P.W.6, Salish Monteiro. Omission was also brought out in respect of the fact that when the Accused went to assault the deceased, this witness requested the Accused not to assault the deceased and stretched her hands to ward off the blow. The learned Trial Court has recorded that as per the statement, the knife went below the arm when the witness was trying to separate them. Omission was sought to be brought on record in respect of the fact that the other Accused were armed with chain and belt.

18. The prosecution has examined P.W.10, Shashikant Kundaikar who at the relevant time was working as a labourer, as an eye witness. He states that a day prior to the incident, the deceased and one Romeo had asked him to come to work as a labourer near the Chapel. He states that accordingly, he went and after taking crow bar and other articles came to the site of the incident. He states that the deceased told him to dig pits for erecting cement pillars and accordingly started digging the pits. He states that there were many persons. He, however, does not know their names. He remembers one name of Martha Dias. He states that the deceased was present there and in the meantime, five persons came and started assaulting the

deceased and his wife. According to him, Accused No.1, Roy Fernandes, assaulted the deceased with a belt and thereafter Accused No.2, Anthony D'Souza, gave a blow of a knife on the thigh of the deceased. According to him, the deceased was then put in a Maruti car but the Accused No.1, Roy Fernandes, did not allow the car to proceed.

19. In the cross-examination, an omission was sought to be brought on record that five persons had come and started assaulting the deceased, his wife and others. The learned Trial Judge has recorded that in the statement, it was stated that five persons had come from the house of Deodor Monteiro and started assaulting Felix and his wife. Thus, the omission sought to be proved was disallowed by the learned Trial Court. Omission was brought out in respect of assertion of this witness that Accused No.1, Roy Fernandes, assaulted others. This witness admits he does not remember what clothes Accused No.1, Roy Fernandes, was wearing on that day. He further states that he was having a belt in his hand. He denied the suggestion that Accused No.2, Anthony D'Souza, had not given a blow of the knife on the thigh of the deceased.

20. The Post Mortem was conducted by P.W.3, Dr. E. J. Rodrigues, and the Report of the Post Mortem is

at Exh.P.W.3/A. P.W.3, Dr. E. J. Rodrigues, noticed following injuries on the person of the deceased;-

Injuries No.1: Abrasion of 3 x 4 mm. vertically oblique towards outer front of right elbow.

2). Abrasion of 5 x 5 cms. x 4.m.m. upper outer part of right four arm with a gap of 1 cms. with injury no.1 and in continuity with injury no.1.

3). Abrasion of 5 x m.s. x 5.m.. upper outer part of right four arm, parallel and 8 ml. inner to injury no.2.

4). Two injection fixed marks on dorsem of left hand with effusion of blood 3 x 1 cms. underneath.

These injuries are surgical in nature.

5). Abrasion of 1 cm. x 3 mml. lower front of right knee.

6). Abrasion of 3.5 x 1.5 cms, lower front of the left knee.

7). Multiple small abrasion injury of 1 x 1 cms. middle front of left knee.

Injuries from 1 to 3 and 5, 6 and 7 are caused by blunt surface and antimortem in nature.

8). Incised stab bone of 2.7 cms. in length with extension of 2.5 cms. in length in an inverted shape manner with a total length of 5.2 cms. present in lower outer left of left thigh at junction of middle

third with lower third 58 cms. above left heel and 53 cms. above outer part of left ankle. The stable wound part is placed horizontally oblique, whereas extension part is placed vertically oblique. The margin part is inside. The inner middeal angle is acutely cut whereas the outer angle has extended and its angle is acute. Then stab wound has made cut in subtutorious tissues of 4 cms. The width of external injury is 1 cm. Further the stab wound made cut into thigh muscle onthe back of 3.5 cms. in length. Under the entry bone and making a crack of 11 cms. depth extending behind left thigh bone with tapering 1 cm. as it comes out of the muscle and cuts the femoral artery and again at the middle part of thigh with complete bisection and further cut the substantaneous tissue making exit wound 1.5 cms. x 3 m.m. with ascute angle and clean cut margin. Obliquely horizontal inner part of left thigh at the junction of middle third with lower third 59 cms. The direction is from left to right and slightly upward. Plenty of effusion of blood present inthe muscle and all over the course of premorel vessel in the thigh. The injury no.8 shows corresponding cut in the short pant. The injury no.8 is the entry exit caused by pointed penetrating cutting weapon and anti-mortem in nature.

21. P.W.3, Dr. E. J. Rodrigues, was shown the

knife, M.O.30 and P.W.3, Dr. E. J. Rodrigues, has opined that injury no.8 could be caused by M.O.30. In the cross-examination, P.W.3, Dr. E. J. Rodrigues, has admitted that injuries no.1 to 3, 5, 6 and 7 were simple in nature. According to him, these injuries could be caused by a fall. He denied the suggestion that thigh was not a vital part of the body. He admitted that thigh was not a vital organ. According to him, if injury was caused to brain, then it has to be taken as injury in the vital part of the body. He has further stated in the cross-examination that injury no.8 was a single injury but through and through completely across the thigh with entry and exit. The depth of the injury was 11 cms. He denied the suggestion that injury no.8 was not sufficient to cause death in ordinary course of nature. He also did not agree with the suggestion that if timely medical treatment had been given to the deceased, he would have survived. He has also denied the suggestion that a weapon having thickness of 2 mm. blade may not cause external injury of 1 cm. width. He has also stated "a pointed part of the pickaxe would not fit in an injury of the width of 1 cm., breadth of 2.7 cms. and length of 11 cms.". He has admitted that incised wound would be caused by weapons like pickaxe, spear, razor, sharp material like broken glass, bottle etc.. He has, however, clarified that he did not find any foreign

objects in the wounds. He has again stated that the deceased could not have been saved even if prompt medical facilities were made available. Thus, according to us taking into consideration the medical evidence of P.W.3, Dr. E. J. Rodrigues, the possibility of deceased having received the injury by a fall on the pointed end of a pickaxe is completely ruled out. The death of the deceased was homicide and not accidental as is suggested to by some of the eye witnesses.

22. P.W.8, Dr. Shanta Sardessai, had examined P.W.7, Conceicao Monteiro, on 11th May, 1997 after P.W.7, Conceicao Monteiro, was referred by the Casualty Department of the Asilo hospital for Radiological examination. Accordingly, X'ray was taken and the X'ray film is at Exh.PW8/B. According to P.W.8, Dr. Shanta Sardessai, P.W.7, Conceicao Monteiro, had right wrist joint fracture. The Certificate issued by P.W.8, Dr. Shanta Sardessai, is at Exh.PW8/A.

23. P.W.19, Dr. Vasco Teles, had examined P.W.7, Conceicao Monteiro. He had also examined Paulo Menezes who had a linear abrasion on the left lower leg. He had examined P.W.5, Martha Dias, who had a bruise on the right knee caused by hard and blunt object less than 24 hours duration and simple in nature. He had

not noticed any injury to Apolina D'Souza, P.W.4, Julie Monteiro and Philomena D'Souza. He had examined Accused No.2, Anthony D'Souza, and had found a contused lacerated wound 2 m.m. x 1 m.m. at the forehead caused by blunt object less than 24 hours in duration and simple in nature. The Certificates were collectively exhibited as PW9/A colly. In the cross-examination, he has admitted that the injury to Paul Menezes, P.W.5, Martha Dias and P.W.7, Conceicao Monteiro, could be caused by a fall. In respect of injury to Accused No.2, Anthony D'Souza, P.W.19, Dr. Vasco Teles, has admitted that the said injury could be caused by a stone hitting his forehead.

24. P.W.20, Dr. Ramakant Bhinge, Dental Surgeon, has stated that he had examined Remedios Monteiro on 11th May, 1997 at 10.45 a.m.. Remedios Monteiro is P.W.6, who is also known as Salish Monteiro. P.W.6, Salish Monteiro, had an abrasion over the lower lip and bruise on the upper arm caused by blunt and hard object. He had given history of assault by fist. According to P.W.20, Dr. Ramakant Bhinge, the incisor had fallen and the second lateral incisor was shaky and he was advised to extract. The Certificate is at Exh.PW20/A. P.W.20, Dr. Ramakant Bhinge, has further stated that he had extracted the natural tooth. He has further stated that in the Certificate by mistake in

column no.2, he has written that the tooth "false" instead of writing tooth "falls". The said Certificate is at Exh.PW20/B. He has again reiterated that it was a natural tooth which was extracted. According to him, one tooth had fallen and the other had become loose because of a fist blow. In the cross-examination, he has admitted that the injury to P.W.6, Remedios Monteiro, could be caused by a fall.

25. The prosecution has examined P.W.11, Suresh Matonkar, a panch witness in respect of the disclosure and seizure of cycle chain at the instance of Accused No.5, Mervin Menezes. The panchanama is at Exh.PW11/A. In support of the same panchanama, the prosecution has also examined the other panch namely P.W.12, Indrakant Salgaonkar. The prosecution has examined P.W.13, Ramprasad Joshi, a panch in respect of the discovery memorandum of knife, M.O.30 at the instance of Accused No.3, Domnic Fernandes, and Accused No.4, Sandeep Morajkar. The panchanama at Exhs. P.W.13/B is in respect of the House Search Panchanama of Accused No.1, Roy Fernandes, which yielded .32 revolver cartridges, eight in number and a knife cover of brown colour.

26. The learned Trial Court in para 49 of his Judgment has not accepted the Section 27 memorandum in respect of discovery of knife. We have carefully

examined the evidence on record and we see no reason to disagree with the finding recorded by the learned Trial Court that the prosecution has not been able to establish that the knife was discovered in pursuance to the statement made by the Accused. The learned Trial Court after appreciating the evidence of P.W.13, Ramprasad Joshi and that of the Investigating Officer has recorded the finding. The learned Trial Court has further held that failure on the part of the prosecution to prove the discovery would not cause "damage" to the prosecution because in view of the direct evidence of the witnesses and the identification of the knife by the prosecution witnesses. The learned Trial Judge then referred to the evidence of P.W.18, N.R.Shankpal, who has opined that the cut marks on the trouser of the deceased could be caused by the said knife and has also opined that the knife, M.O.30, fits in the cover recovered during the house search of Accused No.1, Roy Fernandes. The learned Trial Judge, then relying on the evidence of P.W.3, Dr. E. J. Rodrigues, has recorded a finding that the injury to the deceased particularly stab wound was caused by knife M.O.30.

27. The prosecution has relied on the evidence of P.W.9, R. V. Parab, a Clerk working in the Office of Mamlatdar, to prove the memorandum of identification

parade at Exh.PW9/A. The identification parade had been conducted by one Shri Kantak, who was a Mamlatdar and an Executive Magistrate. During the pendency of the trial, Shri Kantak, expired and, therefore, the prosecution had examined P.W.9, R. V. Parab, who was also a panch witness to the identification parade for proving the said memorandum.

28. Mr. Lalit Chari, the learned Senior Counsel appearing for the Appellant No.1 has led a scathing attack on the testimony of P.W.9, R. V. Parab. According to him, all the five Accused were put up in the identification parade along with only five dummies.

29. Mr. A. P. Lawande, the learned Public Prosecutor has very fairly conceded that the identification parade was conducted in far from satisfactory manner. The learned Trial Court has accepted the evidence of the identification parade and has recorded a finding "merely because some guidelines have not been complied, it cannot be said that the entire identification parade has to be discarded". Further, the learned Trial Court has also observed that Accused No.4, Sandeep Morajkar, and Accused No.5, Mervin Menezes, in their Statements under Section 313 of Criminal Procedure Code had raised a plea of alibi but since they had failed to establish and prove the

same, an inference could be drawn that they were present at the scene of the offence.

30. It is true that the identification of the Accused for the first time in the Court without being corroborated by a test identification parade is a weak piece of evidence. It does not necessarily mean that the Courts in all cases should reject the claim of the eye witnesses in respect of the identification of the Accused. The holding of the test identification parade corroborates the identification of the Accused by the witnesses in the Court. If, there is other evidence in the form of circumstantial evidence which can be said to prop the identification of the Accused in the Court, the Court can accept the identification made by the witnesses of the Accused for the first time in Court without being backed by an identification parade. What the Courts have to see is whether the witnesses had an opportunity of observing the features of the Accused during the incident and whether there was opportunity enough for the observations of the features of the Accused to be imprinted on the memory of the witnesses. The other corroborative evidence, therefore, would then lend an assurance to the Court that the identification of the Accused by the witnesses is proper. In the present case, all the witnesses have admitted that Accused Nos.3, 4 and 5 were not known to them. They

had seen the said Accused for the first time on the day of the incident. The witnesses had not described either the features or the clothes worn by the Accused. No incriminating articles have been recovered from the Accused Nos.3, 4 and 5 to connect their presence at the scene of the offence. The discovery memorandum in respect of knife has been rejected by the learned Trial Court and according to us rightly so. Two bicycle chains are alleged to have been discovered at the instance of Accused No.5. On one of the chains, P.W.17, N.R.K. Rao, in his report at Exh.PW17/A has noticed blood. However, none of the Medical Officers have opined that the deceased has received any injuries as a result of blow by chain. Though, the witnesses are categorical in their statement that five persons including Accused No.1 had alighted from the car, according to us, the prosecution has not been able to establish beyond reeasonable doubt that Accused Nos.3, 4 and 5 were amongst those five persons involved in the incident. According to us, Accused Nos.3, 4 and 5 are entitled to be given the benefit of doubt and deserve to be acquitted.

31. At this juncture, it will be useful to make a reference to the defence of Accused No.2, Anthony D'Souza. According to the statement of Accused No.1, Roy Fernandes, under Section 313 of Criminal Procedure

Code, he has stated that he along with Accused No.2, Anthony D'Souza, were present and a stone had been hurled which caused injury to Accused No.2, Anthony D'Souza. Accordingly, Accused No.1. Roy Fernandes and Accused No.2, Anthony D'Souza, had gone to the Police Station to lodge a report but the Police declined to accept the report. P.W.22, Subhash Goltekar, has admitted that Accused Nos.1 and 2, Roy Fernandes and Anthony D'Souza, had come to the Police Station to lodge a complaint in regard to the said incident. In the cross-examination, he has denied the suggestion that he had seen Accused nos.1 and 2, Roy Fernandes and Anthony D'Souza, at the Police Station at 8.45 a.m. He could not however say to this suggestion that Accused Nos.1 and 2, Roy Fernandes and Anthony D'Souza, had come to the Police Station at 8.10 to 8.20 a.m.. He admits that he did not record the complaint of Accused Nos.1 and 2, Roy Fernandes and Anthony D'Souza. He further admits that the complaint lodged by Accused Nos.1 and 2, Roy Fernandes and Anthony D'Souza, was not registered since he was aware that both Accused Nos.1 and 2, Roy Fernandes and Anthony D'Souza, were involved in the offence of murder and hence, he did not record their complaint. He denied the suggestion that Accused No.2, Anthony D'Souza had stated to him that P.W.6, Salish Monteiro, had pelted a stone on his head. He also admitted that in the station diary entry no.28,

there are instructions from the higher Officers not to register the complaint of Accused No.1, Roy Fernandes. This witness has also stated in the cross-examination the contents of the station diary entry at sr.no.28 which reads as under:-

> "The acc.no. in Cr.No.100/97 Shri Roy Fernandes before being sent to G.M.C., requested that his complaint be registered against the deceased and others who will fully restrain him from entering in his inlaws house at Bastora and assaulted him and his friend at 7.30 hours at Bastora, where he along with his friend being to the inauguration ceremony of his inlaws house. As he being the acc. in the above mentioned crime the matter was discussed with S.D.P.O. to Mapusa and in turn to S.P. North on telephone. The superiors instructed that he is the acc. concerned in a serious case and he trying to create a defence as such his complaint should not be registered".

32. Accused No.2, Anthony D'Souza, in his statement under Section 313 of Criminal Procedure Code, in response to Question No.104 whether he wanted to say anything more has replied "nothing". In the cross-examination, it is suggested to the witnesses that an injury was caused to Accused No.2, Anthony D'Souza, when P.W.6, Salish Monteiro, had pelted a stone at him.

33. Mr. Teles, the learned counsel appearing for the accused no. 2 Anthony has also reiterated the same defence before us by contending that accused no. 2 Anthony was at the scene of the incident alongwith accused no. 1, Roy and had received an injury on his forehead as a result of pelting of stone by P.W.6, Salish. Thus, since the presence of accused no. 2 Anthony at the scene of the offence is admitted by accused no. 2 Anthony, the benefit of deficiency in the identification parade cannot be extended to accused no. 2 Anthony.

34. Mr. Lalit Chari, the learned senior counsel appearing for the accused no. 1, has urged before us that the conduct of the accused nos. 1 and 2 in immediately going to the police station to lodge a complaint is a pointer to their innocence. It is indeed unfortunate that the complaint sought to be filed by the accused no. 1 was not accepted by the police station on the specious ground that the involvement of accused nos. 1 and 2 was spelt out for an offence punishable under Section 302 of the Indian Penal Code. Be that as it may, merely going to the police station to lodge a complaint against the prosecution witnesses would not probabilize the defence taken by the accused. In the face of the evidence of the eye witnesses, it is extremely difficult to hold

that only an incident of stone throwing by P.W.6 Salish had taken place. The eye witnesses are categorical in their statements that the accused no. 2 had stabbed the deceased when he had come to the scene of offence alongwith accused no. 1 accompanied by three other persons. The attempt of accused nos. 1 and 2 of going to the police station can at best be said to be an attempt to lay a foundation in the defence which has been taken in the trial. That would not necessarily probabilize the defence that they have taken. Moreover, from the evidence of the Investigating Officer, it does not emerge that accused nos. 1 and 2 were in the police station at the time when the incident is alleged to have taken place. In view of this, we have no difficulty in holding that accused nos. 1 and 2 have not been able to probabilize their defence.

35. Mr. Lalit Chari, the learned senior counsel appearing for the accused no. 1, has urged before us that the prosecution evidence is unreliable in view of the discrepant version of the prosecution witnesses regarding the overt acts attributed to the appellant no. 1. According to the learned senior counsel there are omissions in the evidence of P.W.1 Sebastiana Monteiro in respect of giving of fist blow on the mouth of P.W.6 Salish. According to the learned senior

counsel, the series of omissions in the evidence of P.w.1 Sebastiana Monteiro renders her evidence doubtful and no conviction could be based on such testimony.

36. We have adverted to the examination-in-chief and cross-examination of P.W.1 Sebastiana Monteiro. It is true that there are omissions in her evidence. The omissions which have been proved on record are in respect of the First Information Report, which is lodged by her. The First Information Report Exhibit P.W.1/A was lodged promptly with the police. We have already pointed out in the earlier part of the Judgment that in the First Information Report she refers 'they first attacked one Salish assaulting him on his face with fist blows'. In the substantive evidence she no doubt states that it was accused no. 1 who had assaulted Salish. This discrepancy would have been an important discrepancy had the prosecution not examined P.W.6 Salish. P.W.6 Salish in his evidence states that accused no. 1 had given him a fist blow due to which one tooth was uprooted. In the cross-examination the version of P.W.6 Salish remains intact. This version of P.W.6 Salish is further corroborated by the evidence of the other eye witnesses. Moreover, the omissions which have been brought in the evidence of P.W.1 Sebastiana Monteiro are from the First Information Report lodged by her. A First Information Report is

not meant to be an encyclopaedic documentation of the incident. Minor omissions not touching the core of the evidence do not destroy the evidence of a witness. There are omissions in the evidence of the other eye witnesses which we have adverted to above. According to us none of these omissions are on the vital aspects of the prosecution case and, therefore, these omissions do not affect the credibility of the eye witnesses. The eye witnesses are natural witnesses to the incident and there is nothing in the cross-examination to discredit their credibility. Omission and contradictions in respect of assault on the other injured eye witness or minor inter se discrepancy in the evidence of the eye witness, not touching the basic fabric of the prosecution case will not result in the jettisoning of the prosecution case. Infact, minor contradictions and omissions in the evidence of eye witnesses, particularly when prosecution examines a large number of eye witnesses, lends assurance to the Court regarding the truthfulness of the assertion and dispels the cloud of suspicion that the witnesses may be 'got up' witnesses.

37. Mr. Chari, the learned senior counsel, has also urged that the Court should insist that a minimum of two reliable witnesses speak about the overt act of the individual accused. The prosecution has examined

P.W.1 Sebastiana Monteiro, P.W.4 Julie Monteiro, P.W.5 Martha Dias, P.W.6 Salish Monteiro, P.W.7 Consesao Monteiro and an independent witness P.W.10 Shashikant Kundaikar. Out of these, P.W.1 Sebastiana Monteiro, P.W.5 Martha Dias, P.W.7 Consesao Monteiro and P.W.10 Shashikant Kundaikar speak about the overt act of accused no. 2. Thus, there is overwhelming evidence in respect of the overt acts of both accused 1 and 2. Therefore, the test laid down by the Supreme Court in **Masalti v. The State of Uttar Pradesh**, A.I.R. 1965 S.C. 202, is fully satisfied.

38. From the evidence of the eye witnesses it is apparent that the accused 1 and 2 alongwith three other persons alighted from the car. The unlawful assembly, therefore, consisted of 5 persons. The common object of the unlawful assembly was to commit the murder of deceased Felix. This is evident because accused no. 2 did not use the knife to cause injuries to others. After he had stabbed deceased, accused no. 2 kept the knife back in its cover. The evidence on record points out that when accused no. 2 alighted from the car he had a knife in his hand. The other members of the unlawful assembly were armed with belt and bicycle chains. The evidence also suggests that it was the deceased who was attempting to construct the compound to the Chapel property. On an earlier occasion a truck

of laterite stones was not allowed to be unloaded by accused no. 1. Thus, the relations between the deceased and accused no. 1 and his mother-in-law Rosalina were strained. All the accused had come together in the car of accused no. 1 and immediately on coming to the scene of offence they had proceeded to assault the deceased and the other eye witnesses. In such circumstances, the evidence unerringly points out that the common object of the unlawful assembly was to cause the murder or to inflict such injuries to the deceased as was likely to result in his death. Thus, in prosecution of the common object, accused no. 2 had stabbed the deceased on his thigh. Since we have acquitted accused nos. 3, 4 and 5 on the ground that their presence is not established, the question which arises for our consideration is whether due to the acquittal of three accused, accused nos. 1 and 2 could be said to be members of the unlawful assembly. We have already recorded a finding that 5 persons alighted from the car. Out of the 5 persons, presence of accused nos. 1 and 2 has been proved by the prosecution. Accused nos. 3, 4 and 5 have been acquitted because the prosecution is unable to prove their presence at the scene of offence.

39. The Apex court in **Kartar Singh v. State of Punjab,** A.I.R. 1961 S.C. 1787, has held:-

> " Where the trial Court can legally find that the actual number of members in the assailants' party was more than five, the said party will constitute an unlawful assembly even when only three persons have been convicted. It is only when the number of the alleged assailants is definite and all of them are name, and the number of persons found to be proved to have taken part in the incident is less than five, that it cannot be held that the assailants' party must have consisted of five or more persons. The acquittal of the remaining named persons must mean that they were not in the incident. The fact that they were named, excludes the possibility of other persons to be in the assailants' party and especially when there be no occasion to think that the witnesses naming all the accused could have committed mistakes in recognizing them."

40. The Apex Court in **Khem Karan and others v. The State of U.P. and another,** A.I.R. 1974 S.C. 1567, has held:-

> " The fact that a large number of accused have been acquitted and the remaining who have been convicted are less than five cannot vitiate the conviction under S. 149 read with the substantive offence if there are other persons who might not have been identified or convicted but were party to the crime and together constituted the statutory number."

41. The Supreme Court in **Dharam Pal and others v. The State of U.P.,** A.I.R. 1975 S.C. 1917, has held:-

> " If only five known persons are alleged to have participated in an

> attack but the Courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number.
>
> On the other hand, if the Court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding, based on good evidence and sound reasoning that the participants were five or more in number."

42. The First Information Report in respect of the incident was lodged by P.W.1 Sebastiana Monteiro. In the First Information Report she had named only accused no. 1. The evidence of the prosecution witnesses is categorical that alongwith accused no. 1, 4 other persons also alighted from the car. Thus, the evidence of the prosecution witnesses is that there were 5 persons including accused no. 1. The witnesses have admitted that accused nos. 2 to 5 were unknown to them. Thus, in this case accused no. 1 was alone named as an accused who had committed the offence alongwith 4 unknown persons. Relying on the aforesaid Judgments of the Apex Court, we are of the view that accused no. 1 and accused no. 2 were members of the unlawful assembly alongwith 3 other unknown persons and in the prosecution of the common object of the unlawful assembly death of deceased was caused and injuries to witnesses. Accused

nos., 3, 4 and 5 have been acquitted because the prosecution has not been able to establish their presence at the scene of offence. We have, therefore, no hesitation in maintaining the conviction and sentence passed by the learned trial Court as against accused nos. 1 and 2 while holding that they were members of the unlawful assembly alongwith three other unknown persons. As held by us earlier, accused nos. 3, 4 and 5 deserve to be acquitted by giving them the benefit of doubt.

43. The learned counsel appearing for the accused no. 2 has urged that the accused no. 2 would at the most be guilty of an offence punishable under Section 304 Part II of the Indian Penal Code. According to the learned counsel, the accused no. 2 is alleged to have dealt a single blow. The situs blow is not on any vital part of the body and as such it cannot be inferred that accused no. 2 had an intention to commit the murder of the deceased. A perusal of evidence of P.W.3 Dr. E.J. Rodrigues would show that the total depth of the wound was 11 cms.. The knife had been pierced with such ferocity that there was an exit wound at the situs. The injury had also cut the femoral artery. During cross-examination P.W.3 Dr. Rodrigues has stated 'I deny the suggestion that thigh is not a vital part of the body'. It is further admitted by P.W.3 Dr.

Rodrigues in the cross-examination that the deceased would not have survived even if timely medical treatment had been given to the deceased. In the face of this evidence, it is difficult to hold that the accused had no intention of causing the death of the deceased. The force with which the blow was given is indicative of the fact that the intention was to cause injuries to the deceased which would result in his death or at least the accused had the knowledge that it is likely to cause the death of the deceased. The weapon of assault was a dangerous weapon capable of causing injury to the depth of 11 cms.. In the face of this evidence, therefore, we are unable to accept the submission that the accused no. 2 would be guilty of an offence under Section 304 Part II of the Indian Penal Code and not guilty of an offence punishable under Section 302 of the Indian Penal Code.

44. In the result, therefore, Criminal Appeal No. 69 of 2000 is partly allowed. The conviction and sentence as passed by the Additional Sessions Judge, Mapusa in Sessions Case No. 21 of 1997 convicting the appellant nos. 2, 3 and 4/original accused nos. 3, 4 and 5 is hereby quashed and set aside and they are acquitted of the aforesaid charges. They be released forthwith, if not wanted in any other case. The conviction and sentence of appellant no. 1/original accused no. 1 is maintained and his appeal is,

accordingly, dismissed. The appellant no. 1/original accused no. 1 is on bail. His bail bond stands cancelled. Four weeks time is granted to him to surrender to his bail. Criminal Appeal No. 77 of 2000 is dismissed maintaining the conviction and sentence passed against the appellant/original accused no. 2.

(V.C. DAGA)
JUDGE.

(P.V. HARDAS)
JUDGE.

ed's.